

A **Dato Ting Check Sii v**
Datuk Haji Mohamad Tufail bin Mahmud & Ors

B HIGH COURT (KUCHING) — ORIGINATING PETITION NO 26–05 OF
2006–II
HAMID SULTAN JC
25 APRIL 2007

C *Civil Procedure — Summons in chambers — Application for interlocutory orders in chambers — Petition under s 181 of the Companies Act 1965 — Application by petitioner for interlocutory order during hearing of s 181 petition that a team of two approved company auditors be appointed by court to carry out a full investigative audit on accounts of ninth respondent company — Petitioner did not state ground of application*
D *— Whether petitioner breached O 32 r 1 read with Form 62 of the Rules of the High Court 1980 — Whether non-compliance of O 32 r 1 of Rules of the High Court 1980 read with Form 62 fatal — Rules of the High Court 1980 O 32 r 1, Form 62*

E *Companies and Corporations — Member's rights — Oppression — Petition under s 181 — Application for interlocutory order during hearing of s 181 petition that a team of two approved company auditors be appointed by court to carry out a full investigative audit on accounts of ninth respondent company — Whether court should interfere in internal management of ninth respondent company by issuing interlocutory order whilst hearing the s 181 petition — Companies Act 1965 s 181 — Rules of the High Court 1980 O 92 r 4*
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G The petitioner and the first respondent were the founding members of the ninth respondent company. The petitioner, as a minority shareholder, claimed that he had been oppressed by the acts of the first to eighth respondents and had filed a petition under s 181 of the Companies Act 1965 ('CA') ('s 181 petition'). The board of directors of the ninth respondent company comprised of the petitioner and the first to sixth respondents. On 22 January 2007, the petitioner received a notice of a board of directors meeting of the ninth respondent company, the agenda of which included a proposed resolution 'To deliberate on the engagement of an independent external auditor to inspect the accounts from the inception of the company until the year 2002'. The petitioner believed that the respondents intended to produce a report to be used by the respondents against him in the s 181 CA 1965 petition. As a consequence, the petitioner sought for an interlocutory order inter alia that a team of two approved company auditors be appointed by the court to carry out a full investigative audit of the accounts of the ninth respondent company under the courts' inherent jurisdiction under O 92 r 4 of the Rules of the High Court 1980 ('RHC'). The respondents objected the petitioner's application and contended that the petitioner having had due notice of the meeting of the board of directors of the ninth respondent company and being a director of the ninth respondent company, the petitioner was at liberty to attend the board of directors meeting and forward his
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views, proposals and/or complaints. Instead, the respondents contended that the petitioner did not avail himself of the opportunity to do so and took the drastic step of inviting the court to determine matters that was well within the purview and powers of the internal management of the ninth respondent company. The respondents had also raised a preliminary objection that there was a substantial failure on the part of the petitioner to state the grounds of his application and in consequence, it was fatal, pursuant to O 32 r 1 of the RHC as Form 62 clearly and unequivocally stipulated the requirement to state the grounds for the petitioner's application by the words. In addition, to further compound the matter, despite several requests by the respondents' solicitors, the petitioner had refused to state in any terms whatsoever any grounds on which the petitioner's affidavit was based upon. The issues to be decided by the court were (a) whether the non-compliance of O 32 r 1 of RHC to be read with Form 62 was fatal; (b) whether the court should interfere in the internal management of the ninth respondent company by issuing the interlocutory order whilst hearing the s 181 petition; and (c) what was the scope of inherent jurisdiction on the facts of this case.

Held, dismissing petitioner's application with costs to be taxed:

- (1) Ample opportunity was given to the petitioner to set out the grounds for the application but the petitioner had refused to do so and proceeded to file the application in breach of O 32 r 1 of the RHC and Form 62. Such a conduct by the petitioner was an abuse of the process of court and ought to be dealt with punitive measures by ordering the solicitors to personally bear the costs of the application. It was important and necessary to the respondents for a quick appreciation of the grounds the application and Form 62 must be complied with (see para 17).
- (2) The court generally will not interfere in the internal management of a company by issuing interlocutory orders whilst hearing a petition under s 181 of the CA. However, this does not mean that the court does not have jurisdiction and powers to make interlocutory orders to deal with any issues as the justice of the case may warrant. In this case, the petitioner was not seeking for an independent auditor to be appointed but was attempting to seek an order which totally changes the character of the s 181 petition. Therefore the application for the interlocutory order could not be entertained as the relief set out under s 181 of the CA was a restrictive remedy and cannot in principle be abused by way of interlocutory applications such as the one filed by the petitioner in this case, to obtain investigative powers or like to extract evidence to support the petitioner's case. This was because, for the petitioner to succeed, the petitioner must make out a case on the facts transpiring on the date of the petition. Facts arising subsequent to the filing of the s 181 petition cannot be relied on (see para 18); *Kalinga Tubes Ltd v Shanthi Prasad Jain* AIR 1965 SC 1535; and *Mohita Bros (P) Ltd v Calcutta Landing and Shipping Co Ltd* [1970] 40 Com Cases 119 (DB) (Cal) referred.
- (3) The inherent jurisdiction of the court should not be exercised in this case as it is sacrosanct in nature and it must not be seen as a cure for all maladies which the law does not address, or able to provide the relief, *Charles Forte Investment*

A *Ltd v Amanda* [1963] 1 ChD 240 referred. When a person comes before the court seeking remedies in the nature of equitable relief, he must also be expected not to file applications which may be seen to be frivolous, vexatious and an abuse of process of court. The petitioner in filing the application has shown conduct reflecting an unreasonable disposition (see paras 19 & 21).

B **Per curiam:**

C (1) It was necessary and essential for the good of administration of justice for courts to take cognisance of the fact that majority of the members of the bar are young practitioners and engaged in many fields of law. The substantial right of a litigant should not be defeated by procedural irregularities, which was more often than not the fault of the solicitor concerned. The rules of the court specifically provide in clear terms the wide discretion to the court to condone such errors. The courts should not place artificial restraint on its own discretion by imposing subjective test such as 'fundamental defect' when justice could be done by proper order as to costs or otherwise as the court deems fit. It is only in the rarest circumstances that the court should refuse to exercise its discretion. Such cases must be where it will cause injustice of a nature, which cannot be compensated by costs. In condoning non-compliance with the rules of the court, it may be appropriate to order the solicitors concern to bear the costs (see para 15).

E (2) Any solicitor who takes unmeritorious procedural objections must be made liable to pay costs personally. Such an order will arrest procedural skirmishes in limine and pave way for cases to be heard on merits and this will also be a good step to reduce a backlog of cases, as it will act as a deterrent to file unmeritorious applications or raise objections (see para 17).

F **[Bahasa Malaysia summary]**

G Pempetisyen dan responden pertama adalah ahli pengasas syarikat responden kesembilan. Pempetisyen sebagai seorang pemegang saham minoriti, menyatakan bahawa beliau telah ditindas melalui tindakan responden pertama hingga kelapan dan telah memfailkan petisyen di bawah s 181 Akta Syarikat 1965 ('AS') ('petisyen s 181'). Ahli Lembaga Pengarah syarikat responden kesembilan terdiri daripada pempetisyen dan responden pertama hingga keenam. Pada 22 Januari 2007, pempetisyen telah menerima satu notis mesyuarat lembaga pengarah syarikat responden kesembilan, agenda yang termasuk usul yang dicadangkan 'untuk mempertimbangkan berkenaan dengan pengambilan juruaudit bebas dari luar untuk memeriksa akaun daripada penubuhan syarikat sehingga tahun 2002'. Pempetisyen percaya bahawa responden-responden berniat untuk menghasilkan laporan untuk digunakan oleh responden-responden terhadapnya di dalam petisyen s 181 AS. Oleh sebab itu, pempetisyen memohon untuk perintah interlokutori antara lain bahawa satu pasukan daripada dua syarikat audit yang diluluskan dilantik oleh mahkamah untuk menjalankan penyiasatan penuh pengauditan akaun syarikat responden di bawah bidang kuasa sedia ada mahkamah di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Responden-responden membantah permohonan pempetisyen dan mengatakan bahawa pempetisyen mempunyai notis mesyuarat lembaga pengarah syarikat responden kesembilan,

pempetisyen adalah bebas untuk hadir mesyuarat lembaga pengarah dan mengemukakan pandangan, usul dan/atau aduannya. Sebaliknya, responden-responden mengatakan bahawa pempetisyen tidak menggunakan peluang melakukannya dan mengambil langkah yang drastik dengan menjemput mahkamah untuk menentukan perkara-perkara yang diketahui di dalam skop dan kuasa pengurusan dalaman syarikat responden kesembilan. Responden-responden juga membangkitkan bantahan awal bahawa terdapatnya kegagalan yang penting bagi pihak pempetisyen untuk menyatakan alasan permohonan dan menyebabkan, ianya adalah membawa kerosakan, menurut A 32 k 1 KMT yang mana Borang 62 dengan terang dan jelasnya menggariskan syarat untuk menyatakan alasan bagi permohonan pempetisyen secara bertulis. Sebagai tambahan, untuk memburukkan lagi keadaan, meskipun beberapa permintaan daripada peguam responden-responden, pempetisyen telah enggan untuk menyatakan apa-apa terma atau apa-apa saja alasan yang mana affidavit pempetisyen berlandaskan. Isu-isu yang perlu dipertimbangkan adalah (a) sama ada ketakpatuhan A32 k 1 KMT perlu dibaca dengan Borang 62 adalah membawa kerosakan, (b) sama ada mahkamah perlu masuk campur dalam pentadbiran dalaman syarikat responden kesembilan dengan mengeluarkan perintah interlokutori sementara pendengaran petisyen s 181; dan (c) apakah skop bidang kuasa sedia ada atas fakta kes ini.

Diputuskan, menolak permohonan pempetisyen dengan kos untuk ditaksirkan:

- (1) Peluang yang mencukupi telah diberikan kepada pempetisyen untuk menggariskan alasan permohonan tetapi pempetisyen telah enggan untuk melakukannya dan meneruskan dengan memfailkan permohonan dalam kemungkiran A 32 k 1 KMT dan Borang 62. Tindakan tersebut oleh pempetisyen adalah penyalahgunaan proses mahkamah dan patut ditangani dengan tindakan punitif dengan memerintahkan peguam menanggung kos permohonan sendiri. Adalah penting dan perlu untuk responden menyedari dengan segera alasan-alasan permohonan dan Borang 62 mestilah dipatuhi (lihat perenggan 17).
- (2) Mahkamah kebiasaannya tidak akan campur tangan di dalam pengurusan dalaman sesebuah syarikat dengan mengeluarkan perintah interlokutori sementara satu petisyen di bawah s 181 AS. Tetapi, ini tidak bermakna bahawa mahkamah tidak mempunyai bidang kuasa dan kuasa untuk membuat perintah interlokutori untuk berurusan dengan apa jua isu-isu yang mana keadilan kes terjamin. Dalam kes ini, pempetisyen tidak meminta untuk juruaudit bebas untuk dilantik tetapi cuba untuk mendapatkan perintah yang mengubah keseluruhan corak petisyen s 181. Oleh itu permohonan untuk perintah interlokutori tidak boleh dilayan tang mana relif yang digariskan di bawah s 181 AS adalah remedi yang terhad dan tidak boleh secara prinsipnya disalah gunakan secara permohonan interlokutori seperti yang difailkan oleh pempetisyen dalam kes ini, untuk mendapatkan kuasa menyiasat atau seperti memperoleh bukti bagi menyokong kes pempetisyen. Ini adalah kerana, bagi pempetisyen untuk berjaya, pempetisyen mesti membina kes atas fakta yang berlaku pada tarikh petisyen. Fakta yang berbangkit selepas pemfailan petisyen s 181 tidak boleh digunakan (lihat perenggan 18); *Kalinga*

A *Tubes Ltd v Shanthi Prasad Jain* AIR 1965 SC 1535; dan *Mohita Bros (P) Ltd v Calcutta Landing and Shipping Co Ltd* [1970] 40 Com cases 119 (DB) (Cal) dirujuk.

(3) Bidang kuasa sedia ada mahkamah seharusnya tidak digunakan dalam kes ini yang mana ianya adalah tidak dipertikaikan dan ianya mestilah tidak dilihat sebagai penawar kepada semua penyakit yang mana undang-undang tiada petunjuk atau boleh menyediakan relif, *Charles Forte Investment Ltd v Amanda* [1963] 1 ChD 240 terpakai. Apabila seseorang hadir di hadapan mahkamah memohon remedi yang bersifat relif ekuiti, beliau mestilah juga dijangka tidak memfailkan permohonan yang mana kelihatan remeh, menyusahkan dan menyalah guna proses mahkamah. Pempetisyen dalam memfailkan permohonan telah menunjukkan refleksi tindakan kecenderungan yang tidak munasabah (lihat perenggan 19 & 21).

Per curiam:

D (1) Adalah perlu dan penting bagi pengurusan keadilan yang baik bagi mahkamah untuk mengambil tahu fakta bahawa majoriti ahli bar adalah pengamal muda dan berurusan dalam banyak bidang undang-undang. Kepentingan hak litigan seharusnya tidak ditewaskan oleh ketidakpatuhan prosedur yang mana selalu berlaku daripada kesilapan peguam berkenaan. Peraturan mahkamah terutama, menyediakan terma yang jelas budi bicara mahkamah yang luas untuk membiarkan kesilapan tersebut. Mahkamah seharusnya tidak meletakkan penahanan tiruan ke atas budi bicaranya dengan melaksanakan ujian subjektif seperti 'kerusakan asasi' apabila keadilan boleh dilakukan dengan perintah yang sesuai terhadap kos atau yang lain yang mana mahkamah merasakannya sesuai. Ianya hanyalah di dalam keadaan yang jarang berlaku bahawa mahkamah seharusnya menolak untuk melaksanakan budi bicaranya. Kes-kes tersebut mestilah yang mana ianya menyebabkan ketidakadilan secara kebiasaannya, yang tidak boleh diberi pampasan secara kos. Dalam membiarkan ketidakpatuhan dengan peraturan mahkamah, ianya berkemungkinan sesuai untuk memerintahkan peguam berkenaan menanggung kos (lihat perenggan 15).

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H (2) Mana-mana peguam yang mengambil bantahan prosedur yang tidak bermerit mestilah dijadikan bertanggung untuk membayar kos sendiri. Perintah tersebut akan menahan pertelingkahan prosiding in limine dan membuka jalan bagi kes-kes didengar secara merit dan langkah yang baik juga untuk mengurangkan tunggakan kes, yang mana ianya akan bertindak sebagai pencegahan kepada fail permohonan yang tidak bermerit atau menimbulkan bantahan (lihat perenggan 17).]

I Notes

For cases on summons in chambers generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3354–3368.

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 440–483.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Alom Industries Sdn Bhd v Wong Hoang Chiong [2006] 1 CLJ 1 (refd)

Back 2 Bay 6 Pty Ltd, Re [1994] 12 ACLC 253 (refd)

Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134 (refd)

Charles Forte Investment Ltd v Amanda [1963] 1 Ch D 240 (refd)

Chellappa Kalimuthu v Sime UEP Properties Bhd & Ors [2002] 2 MLJ 209 (refd)

Cheow Chew Khoon (T/A Cathay Hotel) v Abdul Johari Bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321 (refd)

Fong Poh Yoke & Ors v The Central Construction Company (Malaysia) Sdn Bhd [1998] 4 CLJ SUPP 112; [1998] MLJU 478 (refd)

Hamzah TR & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45 (refd)

Hock Seng Construction Sdn Bhd & Anor v Yeoh Poh Owi & Anor [2001] 4 CLJ 1 (refd)

Jasabena Sdn Bhd v Beh Heng Poo & Anor [1985] 1 MLJ 394 (refd)

Jenkins v Enterprise Gold Mines NL [1992] 10 ACLC 136 (refd)

Kalinga Tubes Ltd v Shanthi Prasad Jain AIR 1965 SC 1535 (refd)

Loo Chay Meng v Ong Cheng Hoe [1990] 1 MLJ 445 (refd)

Maharin Nisha Hassan Mohamed v Panir Selvam Chellamuthu & Anor [2005] 6 MLJ 572 (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)

Mohita Bros (P) Ltd v Calcutta Landing and Shipping Co Ltd [1970] 40 Com Cases 119 (DB) (Cal) (refd)

Mokhtar bin Amin v Mohamed Mokhtar bin Omar [2001] 4 MLJ 329 (refd)

Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178 (refd)

Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor [1975] 2 MLJ 188 (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)

Legislation referred to

Companies Act 1965 ss 167, 181

Companies Act 1985 [UK] s 461(1)

Companies Code [NSW] s 320(2)

Rules of the Court of Appeal 1994 r 102

Rules of the High Court 1980 O1A, O 2 r 1(1), (2) & (3), O 32 r 1, O 92 r 4, O 94 r 4

Specific Relief Act 1950 Part II, Chapter VII

George Lo (George Lo & Partners) for the petitioner.

William Yeo (JM Lim & Co) for first, fifth, sixth, eighth & ninth respondents.

Sim Hui Chuang (Reddi & Co) for second, third, fourth & seventh respondents.

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Hamid Sultan JC:

B [1] This is my judgment in respect of the petitioner's application, encl 33 filed in the petition under s 181 of the Companies Act 1965 ('CA') seeking an interlocutory order, inter alia, that:

- C** (1) a team of two approved company auditors be and is hereby appointed to carry out a full investigative audit of the accounts of the ninth respondent Sanyan Wood Industries Sdn Bhd on the following terms:
- D** (a) the period of the accounts to be audited shall be from 2 August 1991 up to the date of this order.
- E** (b) the court-appointed auditors shall have full and unrestricted access to all accounting and other records of the ninth respondent and, without limiting the generality of the foregoing, such records shall include: (i) general ledger; (ii) debtors' ledger; (iii) creditors' ledger; (iv) all payment vouchers; (v) all official receipts and receiving vouchers; (vi) all monthly bank statements along with their respective monthly bank reconciliation statements; (vii) all sales invoices; (viii) all purchases invoices/supplier invoices; (ix) all purchase orders; (x) all goods receipt notes; (xi) all shipping documents relating to sales and purchases of stocks; (xii) all custom declaration forms for import and export of all goods including property plant and equipment purchased from overseas; (xiii) all sales and purchases agreements for logs purchased, sales of plywood and all other related timber products; (xiv) forestry removal passes for all the logs purchased; (xv) all letters of credit and bills of lading; (xvi) all journal vouchers; (xvii) all cheque butts (for all those cheques that have been issued/used); and (xviii) fixed assets register book.
- F** (c) the court-appointed auditors shall jointly and/or severally, by written notice addressed to the first respondent as managing director of the ninth respondent delivered to the ninth respondent's registered address, specify the type of records to be produced for the investigative audit and the managing director shall produce such records within 48 hours of the receipt by the ninth respondent of such written notice.
- G** (d) the court-appointed auditors, at their discretion, shall be entitled to retain audit assistants, clerks and such other support staff as they may decide they need to carry out and complete the investigative audit.
- H** (e) the remuneration and expenses of the court-appointed auditors shall be taxed or certified by the court and paid by the ninth respondent within seven days of the court's certification provided that an initial deposit of RM100,000 shall be paid by the ninth respondent to the court-appointed auditors within three days from the date of this order.
- I** (f) the court-appointed auditors shall commence the audit forthwith upon the making of this order and shall file a monthly report to the court on the progress of the investigative audit.

- (g) the investigative audit shall be completed and a final report filed in this court within three months from the date of this order; and A
- (h) the court-appointed auditors shall be deemed officers of the court.
- (2) the two approved company auditors shall comprise the following: (a) an approved company auditor nominated by the petitioner; and (b) an approved company auditor nominated by the board of directors of the ninth respondent. B
- [2] The first, fifth, sixth, eighth and ninth respondents are represented by one firm of solicitors (hereinafter referred to as solicitors for the first group of respondents) and second, third, fourth and seventh respondents are represented by another firm of solicitors (hereinafter referred to as the solicitors for the second group of respondents). C
- [3] At the date of hearing of encl 33, I specifically asked the petitioner's solicitors under what provision of the law the application has been made. The answer was '*under the courts inherent jurisdiction*'. (Emphasise added.) D
- [4] All the respondents are opposing the petitioner's application, inter alia, on the common ground that the court has no powers or jurisdiction to grant the said order.
- [5] The petitioner in support of the application, inter alia, in his affidavit says as follows: E
- (a) on 22 January 2007, the petitioner received by facsimile transmission, a notice of board of directors meeting dated 22 January 2007 to be held on 30 January 2007. The agenda stated in the notice included a proposed resolution '*To deliberate on the engagement of an independent external auditor to inspect the accounts from the inception of the company until the year 2002*'. F
- (b) the petitioner is agreeable to an independent external investigative audit of the ninth respondent's accounts from inception (2 August 1991) up to the date of the order to be made on this application. However the investigative audit should not be controlled by the board of directors as six out of the seven directors are respondents in this petition and their conduct are impugned in these proceedings. The investigative audit should cover the entire period from inception up to the date of the order and not limited to the years preceding 2002. G
- (c) in view of this petition pending before this court, it is fair and just that the external auditors be appointed by the court and the findings of such audit be reported to the court. This will ensure that the report is transparent and unbiased. H
- (d) the court-appointed auditors should comprise: (i) an approved company auditor to be nominated by the petitioner; and (ii) an approved company auditor to be nominated by the board of directors of the ninth respondent. I
- (e) the court-appointed auditors should be appointed to carry out a full investigative audit of the accounts of the ninth respondent, Sanyan Wood Industries Sdn Bhd, on the following terms as set out in the prayer.

- A** [6] The petitioner in reply to the opposing affidavits of the respondent further, inter alia, says:
- (a) the board of directors of the ninth respondent comprise of the first to sixth respondents and the petitioner himself, all parties to this originating petition.
- B** (b) there are no independent or unbiased members of the board who could have conduct of the investigative audit.
- (c) the petitioner believes that when the respondents proposed a resolution to appoint an external auditor to investigate the accounts of the ninth respondent company up to year 2002, the respondents had intended to produce a report to be used by them against him in these proceedings.
- C** (d) the petitioner was forced to relinquish his position as managing director of the ninth respondent in the year 2003.
- (e) the investigative audit ought not to stop at the year 2002 but should include the subsequent years to ensure that a full and fair picture is given to the court if the external auditor's report is to be used in these proceedings.
- D** (f) to ensure transparency and fairness, this investigative audit ought not be controlled by the respondents. In order that justice be seen to be done, the auditors ought to be appointed by and be answerable to the court.
- E** [7] The first respondent in opposing the application in his affidavit, inter alia, says as follows:
- (a) on 13 July 2006, the petitioner filed Originating Summons No 24-96 of 2006 in the High Court at Sibul, pursuant to s 167 of the CA praying for, amongst other things, an order for the ninth respondent to produce its accounts and other documents to the petitioner and two auditors nominated by him for inspection. On 15 November 2006, the said orders were granted in the terms prayed for.
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- (b) during the hearing of the said originating summons, the ninth respondent's solicitors submitted that the same was an abuse of the court's process since the petitioner had applied for substantially similar orders in prayer (h) of the petition. In response, counsel for the petitioner undertook to withdraw prayer (h) of the petition. These instructions were confirmed by the petitioner in para 5 of his plaintiff's affidavit II, affirmed on 3 November 2006 in support of the said originating summons.
- G**
- H** (c) the appointment of independent external auditors and the terms of such appointment are matters well within the powers of the internal management (ie, the board of directors) of the ninth respondent.
- (d) having due notice of the meeting of the board of directors of the ninth respondent and being a director of the ninth respondent, the petitioner was at liberty to attend the said meeting and forward his views, proposals and/or complaints. The petitioner did not avail himself of the opportunity to do so and instead, took the drastic step of filing the application for investigative audit.
- I**

- (e) the prayers sought for by the petitioner in the application for investigative audit are not practical and/or otherwise unenforceable. There is no legal basis, grounds or authority whatsoever for the petitioner to make the application for investigative audit. A

[8] Other respondents have also filed affidavits but I think it is not necessary to set them out as they are all for similar purpose and based on similar grounds. B

[9] The solicitors for the first group of respondents, inter alia, submit as follows:

- (a) there is substantial failure on the part of the petitioner to state the grounds of his application and in consequence, it is fatal, pursuant to O 32 r 1 of the RHC which states that: C

...Except as provided by O 25 r 7, every application in chambers must be made by summons in Form 62...

And Form 62 of the RHC clearly and unequivocally stipulates the requirement to state the grounds for the petitioner's application by the words '*...The grounds of the application are (state grounds)...*' in its form. D

- (b) the grounds, and in fact the phrase '*...The grounds of the application are...*' are nowhere to be seen in the summons in chambers for the petitioner's application. In light of the words of O 32 r 1 of the RHC '*...must be made by summons in Form 62...*', it is mandatory for the petitioner to state the grounds in the summons in chambers and a failure to do so is fatal to the petitioner's application. In *Chellappa Kalimuthu v Sime UEP Properties Bhd & Ors* [2002] 2 MLJ 209, Hishamudin Yunus J, in dismissing a summons in chambers for its failure to state the grounds of the application stated as follows (at p 212): E

...In my judgment, it is imperative that the grounds for the application be stated in the summons. For the word 'must' is used in r 1 of O 32, and Form 62 stipulates the requirement in clear terms by the presence of the words. F

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The grounds of the application are (state the grounds) in the form. In my opinion, the grounds are an important and essential part of the summons as prescribed by O 32 r 1 and Form 62. Without stating the grounds in the summons in chambers, there has been a serious non-compliance with O 32 r 1 with the consequence that encl 55 cannot be said to be an application made by summons in Form 62 ... H

- (c) to further compound the matter, despite several requests by all respondent's solicitors, the petitioner has refused to state in any terms whatsoever any grounds on which the petitioner's affidavit is based upon.

the petitioner at all material times was and remains a director of Sanyan Wood, who is fully entitled to receive notices of meetings and attend them accordingly. In this instance, there is no question or issue raised as to the petitioner receiving due notice of the board of director's meeting held on 30 January 2007. Receipt of the notice has been explicitly acknowledged by the petitioner in his supporting affidavit. Neither are there any allegations by the I

- A** petitioner that the board meeting held on 30 January 2007 was not properly constituted and held. At no stage prior to the holding of the board meeting did the petitioner object, contest or dispute the agendas proposed for the meeting. To the contrary, the petitioner has no objections and is agreeable to an investigative audit to be conducted for Sanyan Wood. In *Fong Poh Yoke & Ors v The Central Construction Company (Malaysia) Sdn Bhd* [1998] 4 CLJ SUPP 112; [1998] MLJU 478, His Lordship Abdul Malik Ishak J in dismissing a director's application to declare a board meeting invalid took cognizance of the defendant director's absence from the duly convened board meetings stating that:
- B**
- C** ... LLN did not attend meetings of the board of directors nor voted in respect of circular resolutions. It would be difficult, indeed onerous on LLN's part to justify his sudden interest in moving this court to declare a board meeting that proceeded in his absence ...
- D** By analogy with the above case, the petitioner's application ought not to be entertained in the current instance since he was given due notice of the board meetings and was entitled to attend and vote/propose/object accordingly and instead took the drastic step of applying to this court for matters which he could have ventilated at the said meeting.
- E** the petitioner is inviting the court to determine matters well within the purview and powers of the internal management of Sanyan Wood (ie, its board of directors). The following authorities are relevant to this particular point:
- F** (i) '...Court of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their offices, to whom such powers are confided...': CM Row, *Law of Injunctions*, K Swami at p 1780;
- G** (ii) '...While board meetings affect the day to day operations of a company more than general meetings do, the Act does not regulate board meetings. The main reason for this is to allow businesses the flexibility to create their own decision making processes to respond effectively and rapidly to changing business conditions...': Walter Woon on *Company Law* (3rd Ed) at para 6.95;
- H** (iii) '...The principle that the court will not interfere with the internal management of the companies acting within their rights and in fact has no jurisdiction to do so, is based on the supremacy of the majority...': The Honourable Shri MC Desai and Shri RB Sethi in *Law of Injunctions* (2nd Ed, 1985) at para 32.
- I** (f) the decisions/resolutions passed at board of directors meeting is well within the internal management of any company, including the ad-hoc appointment of independent external auditors for investigative audit on such terms as it sees fit. It is wholly improper for the plaintiff to invite this honourable court to interfere with the exercise and flexibility of the management powers of any directors of Sanyan Wood and consequently ought not to be entertained.

[10] The solicitors for the second group of respondents, inter alia, submit as follows:

- (a) it is incumbent upon the petitioner to state what rule, law or jurisdiction the petitioner's application is made under. It is also incumbent upon the petitioner to disclose and state the ground or basis for his application. However, the summons-in-chambers herein does neither. It is true that O 1A of the RHC states, 'In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein'. However, it is elementary that an applicant discloses the grounds of his application so that the respondents know what they have to respond to. It would be contrary to justice of the case to allow the applicant to make his application without disclosing his grounds. This is more so in an instance where the petitioner has been asked his grounds and he has refused to reveal the same. Thus, the petitioner has deliberately not disclosed his ground of the application. The non-compliance with O 32 r 1 and Form 62 are deliberate. It is a fundamental principle that there must be no surprise in civil litigation. The grounds of the application and the rule or law in which the application is made must be clearly stated so that the respondents are not taken by surprise as stated in *Cheow Chew Khoon (T/A Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 per Gopal Sri Ram as follows (at p 477):

The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitlement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitlement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation.

- (b) the petitioner's summons in chambers has also failed to state the provision, law or jurisdiction in which the court is being moved. Such failure is fatal to the petitioner's application as set out in *Cheow Chew Khoon*.
- (c) even though the case of *Cheow Chew Khoon* relates to an originating process, the principle that there must be no surprise in civil litigation is equally applicable to an interlocutory application by way of summons in chambers.
- (d) the petitioner's affidavit state what the petitioner thinks the order he is praying should cover. Thus, the petitioner's affidavit does not contain any facts or grounds upon which the petitioner is asking the court to exercise or assume jurisdiction. The fact that the board of directors of Sanyan Wood has passed the resolution is not a ground for the court to assume jurisdiction and get involved in the affairs or management of Sanyan Wood and make an order as extensive and with such minute details as have been prayed for.

- A** (e) the originating petition herein is specifically an action under s 181 of the Companies Act. In the present context, the jurisdiction under s 181 arises only in respect of complaints:
- B** (i) within s 181(1)(a), that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members (including the petitioner) in disregard of his or their interests as members of the company; or
- C** (ii) within s 181(1)(b), that some act of the company has been done or is threatened or that some resolution of the members has been passed or is proposed, which unfairly discriminates against or is otherwise prejudicial to one or more of the members (including the petitioner).
- D** (f) there is nothing in the petition, the affidavit verifying petition, the application by summons-in-chambers of the petitioner, or the affidavit in support of the application, that alleges that the resolution is oppressive or prejudicial to the petitioner. Moreover, neither has the petitioner indicated any intention to amend the petition to make any allegation about the resolution nor has he applied for the same. Therefore, there is no basis in law or in fact for the petitioner to make the present application by interlocutory application or summons-in-chambers in the originating petition herein.
- E** (g) the petitioner's application herein is not bona fide. It is an attempt to prevent the board of directors of Sanyan Wood from proceeding with its business.

[11] The petitioner submits, inter alia, as follows:

- F** (a) the petitioner and the first respondent are founding subscriber shareholders of the ninth respondent company. The petitioner, as a minority shareholder, he has been oppressed by the acts of the first to eighth respondents. The fifth respondent is the son of the first respondent, the sixth respondent is the first respondent's nominee and the eighth respondent is a company owned and controlled by the first respondent. The second, third and fourth respondents are nominee directors of the seventh respondent. The board of directors of the ninth respondent company comprise of the petitioner and the first to sixth respondents. As all are parties to this action, there are no independent or unbiased members of the board.
- G**
- H** (b) on 22 January 2007, the petitioner was given notice of a board of directors meeting of the ninth respondent company which included a proposed resolution '*To deliberate on the engagement of an independent external auditor to inspect the accounts from the inception of the company until the year 2002*'.
- I** (c) the petitioner was the managing director of the ninth respondent company until he was ousted in early 2003. The petitioner believes 'that the respondents intended to produce a report to be used by them against (him) in these proceedings when they proposed a resolution to appoint an external auditor to investigate the accounts of the ninth respondent company up to year 2002' This averment is not denied by the respondents and is accordingly deemed to be admitted.

- (d) the respondents wish to investigate the ninth respondent company's accounts up to year 2002 but do not want to do so for the subsequent years, the period when the first respondent had taken over as managing director. The report from this auditor is intended to be used in these proceedings. By this application, the petitioner is only asking that: (i) two auditors be appointed by and answerable to the court; and (ii) the period of audit should cover up to the date of this order. A
- (e) the proposal for this audit came from the respondents. They should have no objection to have the auditors appointed by and answerable to the court if they have nothing to hide. B
- (f) the respondents raise a procedural objection that the petitioner has failed to comply with O 32 r 1 of the RHC in that the petitioner's summons does not state the grounds of the application and is not exactly in Form 62. With the introduction of the new order 1A of the RHC, it is respectfully submitted that the court will '*have regard to the justice of the case and not only to the technical non-compliance of any of the rules*'. In *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 at p 405, the Federal Court, after referring to r 102 of the Rules of the Court of Appeal 1994 (which has its equivalent in O 2 r 1(1) and (2) of the RHC, had this to say, as per Steve Shim CJ (Sabah and Sarawak) at p 405: C
- the respondent had neither been misled nor prejudiced in any way notwithstanding the defect. There was no substantial miscarriage of justice involved. That being the position, the defect was certainly curable under r 102 of the Rules of the Court of Appeal. In my view, the Court of Appeal's failure to consider r 102 of the Rules of the Court of Appeal has adversely affected its decision in upholding the preliminary objection of the respondent. On that basis, its decision is therefore flawed resulting in injustice to the appellant. In my view, this is a fit and proper case to invoke the inherent power of the court under r 137 of the RFC in preventing such injustice. D
- (g) even though the summons does not state the grounds of the application, the basis of the application is clearly set out in the petitioner's affidavit in support. Having regard to the Federal Court's decision in *Megat Najmuddin's* case, the issue is whether the respondents had been misled or prejudiced by the defect to such an extent that there has been a substantial miscarriage of justice? The Federal Court's decision had been adopted by an amendment to the RHC in O 2 r 3 which provides: E
- A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. F
- (h) further support for the fact that technical objections will not be allowed may be found in the following cases: G
- A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. H
- (h) further support for the fact that technical objections will not be allowed may be found in the following cases: I

- A** (i) *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 Ahmad Fairuz JCA (now Chief Justice of Malaysia) after going through and adopting numerous judgments against technical objections, held:
- B** Such procedural technical objections should not, in my view, be allowed to obstruct the process of giving justice to the deserving by going into the substantive issues of the matters before the court.
- (ii) *Beauford Baru Sdn Bhd v Gopala Krishnan all VK Gopalan* [2002] 6 MLJ 134 Low Hop Bing J (now JCA) after referring to the amended O 2 r 3 of the RHC held:
- C**
- D** It is clearly the intention and wisdom of the Rules Committee to provide for the smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds, and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.
- (iii) *Alom Industries Sdn Bhd v Wong Hoang Chiong* [2006] 1 CLJ 1 David Wong JC (as he then was) referred to and followed the cases cited above and quoted the judgment of Gopal Sri Ram JCA in *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 as follows:
- E**
- F** The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint.
- (iv) In the case of *Sin Hai Estate Berhad v Lim Jit Kim* Kuala Lumpur High Court Civil Suit No S5-23-94 of 2001 [unreported] Abdul Malik Ishak J opined:
- G**
- I must have regard to the justice of the case and it was part and parcel of my judgment that there was no miscarriage of justice when this court considered and took into account enclosure 18. At any rate, the non-compliance with the rules was certainly curable under O 2 r 1 of the RHC and I so hold accordingly.
- H** (i) although, counsels for the respondents complain about the defect in the summons, it is apparent that the respondents' affidavits in opposition do not allude to any prejudice suffered by them nor do they establish that the defect has occasioned a substantial miscarriage of justice.
- I** (j) the petitioner's omission to state the grounds of its application in the summons has not occasioned a substantial miscarriage of justice and it is therefore a curable defect. Though counsel only disclosed his technical objections within his submission against the application, in truth and in fact, they are preliminary objections on points of procedural law and

proper notice should have been given as set out in *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394.

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- (k) counsel for the respondents argue that there is no provision, law or jurisdiction for the petitioner's application and referred to *Corporate Powers* by Loh Siew Cheang (2nd Ed). In fact, at p 419 of *Corporate Powers*, the learned author wrote:

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There is jurisdiction to grant interlocutory reliefs against acts which are within the meaning of s 181 of the Act.

- (l) the case of *Re Back 2 Bay 6 Pty Ltd* [1994] 12 ACLC 253 is the authority for the proposition that the court, in a s 181 petition, has the jurisdiction to make interlocutory orders in the interests of justice. In that case, the material before the court showed 'that irreconcilable differences between the parties have arisen' and 'there is a strong circumstantial case to suggest that (the applicant's) rights have been prejudiced and remain in danger of being adversely affected by the conduct of the respondents'. The respondents had taken over the entire management of the company and denied the petitioner access to the company's books, records and accounting details. Many of the company's dealings were with another company in which one of the respondents had considerable interest (much like our case where the ninth respondent is compelled to buy all its timber from the eighth respondent, a company owned by the first respondent). The learned judge said that 'there is a sufficient circumstantial case to satisfy me that independent supervision is necessary' and the court appointed a provisional liquidator to independently supervise the company's affairs. A perusal of the order made shows that the court has wide powers to give directions as to the conduct and duties of the court-appointed provisional liquidators.

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- (m) it is therefore respectfully submitted that the wide discretionary powers given to this court under s 181 include the power to make any interlocutory orders in the interest of justice and with a view to preventing further oppressive conduct. This is further fortified by O 92 r 4 RHC that there is no limit on 'the inherent powers of the court to make any order as may be necessary to prevent injustice'.

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- (n) the respondents argue that the petitioner did not avail himself of the opportunity to attend the board meeting and object or complain. It is an irrefutable fact that the respondents comprise six out of the seven directors of the company. It is also a fact that the respondents wish the company to engage an auditor to investigate its accounts for the period in which the petitioner was managing director. The respondents also do not deny the averment in the petitioner's affidavit that the results of the audit are intended to be used by them in these proceedings against the petitioner. They are deemed to have admitted this as stated in the instance of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382. Having regard to the facts aforesaid, there will be no purpose for the petitioner to attend the board meeting to raise his lone voice in objection. The petitioner took the correct approach in bringing

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- A his claim for interlocutory relief to this court for orders that, if there should be an investigation of the company's accounts, it should be a full open transparent investigation by auditors appointed by this court.
- (o) the respondents argue that the resolutions proposed are well within the internal management of the company and it would be improper for the court to interfere with the management powers of the directors.
- B The respondents failed to distinguish between the day to day management of the company as against a special proposal to take an action calculated to influence the outcome of a pending litigation. The respondents do not deny that they intend to use the auditors' report against the petitioner in these proceedings. This brings the respondents' proposal outside the realm of normal day to day management and squarely into the conduct of the present proceedings. It is no longer an ordinary audit. It has become a witch-hunt by the respondents to try to discredit and attack the petitioner in these proceedings. The circumstances surrounding the proposed audit invite judicial intervention to ensure that the resulting investigation is done in a fair and transparent manner. In *Jenkins v Enterprise Gold Mines NL* [1992] 10 ACLC 136 is a clear authority that the court has extremely wide powers to grant relief even if the orders made would interfere with the administration of the company. In that case Jenkins and his wife were minority shareholders of the company which was controlled by Independent Resources Ltd (IRL). Various transactions were entered into between the company and the IRL group of companies which were ratified by the IRL representative Michael who had the controlling vote in the company. Jenkins petitioned for oppression and applied for appointment of a receiver and manager (R&M). At first instance, Murray J refused the appointment of R&M, deciding that 'the court should be wary of intervening in the management of the company to any extent than is necessary to provide the appropriate remedy' and 'it will not intermeddle in the affairs of the company at all unless it sees clear justification'. On appeal, it was held that the R&M ought to be appointed with powers to investigate because there was clear conflict of interest in that the directors failed to act in the interests of the company in relation to transactions with other companies within the group. Besides, large sums of money had left the company to the advantage of other companies without any explanation as to the commercial advantage to the company and how the directors had fulfilled their fiduciary duty to the company (this is again similar to our case where tens of millions of ringgit were unnecessarily paid by the ninth respondent to the eighth respondent as commission for logs purchases, without any explanation as to how this could benefit the ninth respondent). The court appointed a receiver and manager over the company to disenfranchise the powers of the directors and to facilitate investigations into the company's affairs. In doing so, the court held:
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The powers given to the court are extremely wide. They include the powers to make orders regulating the conduct of the affairs of the company in the future. This necessarily involves the court making orders which may interfere with the

internal administration of the company. There is nothing in the language of s 320 [the Australian equivalent of our s 181] which suggests that the court should be reluctant to interfere where that is necessary or desirable to give effective relief ...

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In our opinion the relief required in the present case is the appointment of a receiver and manager. Independent outside management is necessary. The person appointed should investigate the relevant transactions and institute such proceedings as he may be advised where loss or damage has been caused to the company and right of recovery is available.

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- (p) the respondents have overwhelming control over the ninth respondent company. The petitioner has pleaded numerous oppressive acts and conduct on the respondents' part. The respondents now try to use their majority control to instigate an audit that is clearly oppressive to the petitioner and calculated to benefit themselves in these proceedings. There is nothing to prevent the court from intervening and indeed, in the interest of justice, this court ought to intervene and prevent the respondents from further abusing their control of the ninth respondent to the detriment of the petitioner.

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[12] In opposing the petitioner's submission, the first group of respondent, inter alia, submits as follows:

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- (a) the petitioner is moving the court on its inherent jurisdiction to prevent injustice or abuse of the process of the court. It is contrary for the petitioner to rely on the court's inherent jurisdiction under O 92 r 4 of the RHC to prevent injustice when he himself is inviting it to determine matters in the absence of considering the respondents' averments to the petitioner's allegations. It is premature for the court to accept the petitioner's averments as 'facts' when they are disputed by the respondents and when the hearing proper of the originating petition have yet been ventilated before it. The respondents would suffer injustice if this court were to grant encl 33 herein premised on supposed 'brief facts', the truth of which is yet to be tested at the hearing proper of the originating petition.

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- (b) further, the petitioner's submissions is made devoid of any authorities whatsoever, be it in support of the application of O 92 r 4 RHC or (for that matter) any other basis whatsoever. In *Maharin Nisha Hassan Mohamed v Panir Selvam Chellamuthu & Anor* [2005] 6 MLJ 572, Low Hop Bing J states that at p 579:

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... In my view, although O 92 r 4 appears to be wide in scope, it is not carte blanche. There must be a proper basis for it to be invoked ...

- (c) encl 33 ought not to be granted where the petitioner purports to invoke the court's inherent jurisdiction under O 92 r 4 RHC but does not provide any basis and authorities in support other than making bare allegations.

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[13] The second group of respondents in opposing the petitioner's submission, inter alia, follows the submission of the first group of respondent, and state as follows:

- A** (a) the respondents state that O 1A of the RHC ought not to apply. The non-compliances by the petitioner are deliberate. The petitioner refused to disclose the grounds or the provision, law or rule for his application, when requested. The prejudice to the respondents is obvious. It is fundamental that there must be no surprise in civil litigation. The petitioner's deliberate failure and refusal to state the ground, provision, law or jurisdiction in which the
- B** court is being moved is fatal to his application. Order 1A is no longer 'new'. It is about five years since it was introduced. It is now 'familiar'. Such familiarity should not lead to abuse. Order 1A would be turned on its head if a party could deliberately not give grounds knowing and intending that the 'new' O 1A be used to excuse it. Further, it is not in the interest of justice
- C** for the petitioner to employ such tactical manoeuvre and deliberately ignore rules which are there for procedural fairness and justice.
- (b) the undisputed facts show no reason for the petitioner to invoke inherent jurisdiction to get the court to be involved in, oversee or interfere with the management of the ninth respondent company ('the company'). It is not
- D** disputed that:
- (i) the petitioner was given due notice of the meeting of the company's board of directors which was held on 30 January 2007;
- (ii) the petitioner kept quiet about the meeting till the eve of the meeting when he threatened 'sub-judice' and 'contempt of court' in an attempt to prevent the meeting of the board of directors from deciding on the appointment of an independent external auditor;
- E**
- (iii) the petitioner was immediately asked, inter alia, for the basis for the alleged 'sub-judice' and 'contempt of court', but till date, the petitioner has failed to respond or disclose any basis;
- F**
- (iv) the company's board of directors proceeded with its meeting and has duly and properly passed a resolution ('the resolution') to appoint an external auditor;
- (v) the petitioner has had all opportunities to attend the relevant meeting and raise any point, but has failed to do so.
- G**
- (vi) the company is entitled to proceed in accordance with the resolution passed by the board of directors in respect of the external auditor to look into its accounts. There is no reason or basis to stop or restrain the company or the external auditor from proceeding or continuing in accordance with the decision of the company's board of directors as contained in the resolution.
- H**
- (vii) the company is entitled to manage its own affairs. It is entitled to appoint external auditors to look into its account for any period as it may decide. The petitioner has not shown any circumstances why the court should get involved with the internal management of the company and prevent the company from looking into its own accounts. The reluctance of our courts, and for the matter, courts in the commonwealth, to be involved in the internal management of companies is well established.
- I**

- (viii) the petitioner is confusing matters by introducing a distinction of 'day to day management'. The petitioner differentiates between 'internal management' and 'day to day management' but cites no authority for this distinction. The authorities talk about 'management' and 'internal management' and not 'day to day management'. The so-called 'day to day management' is usually relevant only to the question of delegation of duties to a managing director as opposed to overall management by the board of directors. A B
- (ix) the authorities cited by the petitioner are not relevant but only add confusion. The case of *Jenkins v Enterprise Gold Mines* and p 168 of *Corporate Powers* by Loh Siew Cheang (1st Ed) are cited by the petitioner. Firstly, both *Jenkins* and the section from *Corporate Powers* cited, deal with the powers of the court at the conclusion of the main or original action or petition. The opening words of the section cited by the petitioner are, 'Once the conduct complained of is established, there is in substance no limit to the kind of remedial order which the court may make.' In the present application, it is an interlocutory summons-in-chambers. Secondly, it may be noted that the petitioner is citing from the first edition of corporate powers, but the petitioner had already cited from the 2nd Ed of *Corporate Powers*. The part of the 1st Ed cited by the petitioner can be found in the 2nd Ed at pp 426 to 428. In the second edition, the learned author has added at the end of the relevant part cited [see p 428], the view of LP Thean JA in *Kumugai-Gumi Co Ltd v Zenecon Pte Ltd* that s 216(2) of the Singapore statute (which is *pari materia* with s 181(2) of the Act) is narrower than s 461(1) of the Companies Act 1985 [UK] and s 320(2) of the Companies Code [NSW] in respect of remedies because of the words 'with a view to bringing an end or remedying the matters complained of'. In any event, it is clear that the remedies mentioned are relevant only at the conclusion of the main or original action or petition. C D E F
- (x) the authorities cited by the petitioner relate to the final orders in an originating petition under s 181 and not with an interlocutory application on matters not complained of in the originating petition. Similarly the Australian case of *Re Back 2 Bay 6 Pty Ltd* is cited out of context. That case was under s 260 of the now repealed Corporations Law of Australia. The application before the court related to the appointment in that case of a provisional liquidator. The evidence in and the reasoning of that case are directed at the necessity of appointing the provisional liquidator and was aimed at the matters complained of in the main action or originating petition. G H
- (c) there are considerable problems with a so-called 'joint audit under the control of the court. There is no basis for the petitioner's application for a 'joint audit' and no basis for such an extensive and minutely detailed order as prayed. I
- [14] I have read the submissions of the applicant/petitioner and respondent in detail. For the purpose of dealing with the application, I have to consider, *inter alia*, three issues namely:

- A** (i) Whether, non-compliance of O 32 r 1 of the RHC to be read with Form 62, is fatal.
- (ii) Whether the courts should interfere in the internal management of a company by issuing interlocutory orders whilst hearing a s 181 petition.
- B** (iii) The scope of inherent jurisdiction on the facts of this case.

C [15] On the issue of non-compliance, the principles are well settled. A litigant cannot purely complain of non-compliance of rule and seek a matter to be dismissed when there is no evidence to demonstrate that he has suffered any prejudice. Even if there is non-compliance of the rules the matter ought not to be dismissed without giving an opportunity for the other side to comply with if they have inadvertently failed to do so, unless the justice of the case warrants otherwise. In addition to the general principles in respect of non-compliance, in my view it is necessary and essential for the good of administration of justice for courts to take cognisance of the fact that majority of the members of the bar are young practitioners and engaged in many fields of law. The substantial right of a litigant should not be defeated by procedural irregularities, which is more often than not the fault of the solicitor concerned. The rules specifically provide in clear term wide discretion to the court to condone such errors. The courts should not place artificial restraint on its own discretion by imposing subjective test such as 'fundamental defect' when justice could be done by proper order as to costs or otherwise as the court deems fit. It is only in the rarest circumstances that the court should refuse to exercise its discretion. Such cases must surely be where it will cause injustice of a nature, which cannot be compensated by costs. In condoning non-compliance it may be appropriate to order the solicitors concern to bear the costs.

F [16] Court's time is often unnecessarily wasted by procedural objections and technicalities raised without regard to rules and case laws which condone procedural non-compliance. To avert frivolous objections it is an opportune moment to summarise the rules and principles in vogue and they are as follows:

- G** (a) As a general rule, the parties to a civil proceeding must strictly comply with the rules of the court. However where parties have by reason of anything done or left undone failed to comply with the requirements of the rules of the court, whether in respect of time, place, manner, form or content or in any other respect, the court is required to treat the failure of non-compliance as an irregularity and the failure does not nullify the proceedings or any steps taken in the proceedings or any documents, judgment or order therein. This rule has a number of exceptions and will only appear to cover steps taken in the course of commencement of any proceedings and will not include any steps which is a condition precedent before instituting proceedings.
- H**
- I** (c) Dismissal of an action for non compliance of procedural rules has been an anathema in procedural jurisprudence. To avert procedural miscarriage of justice, O 2 of the Supreme Court Practice (white book) was introduced in England. It was meant to be a saving provision to condone procedural irregularities. However, some English judges often defied this sacrosanct provision and in consequence matters were dismissed without merits being heard. The English position is aptly described by Sir Jack IH Jacob in his book

The reform of the Civil Procedure Law and other Essays in Civil Procedure London, 1982, London, Sweet & Maxwell at p 214 as follows:

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A change of fundamental importance was made in relation to the effect of non-compliance with the requirements of the Rules. In all such cases, such non-compliance whatever form it takes must be treated, not as a nullity, but as an irregularity which the court will have power to amend or rectify or regularize. This power, together with the extended powers of amendments after the expiry of the current period of limitation, is intended to prevent technical defects or errors in proceedings from being fatal in themselves and to remove some of the blots which 'have marred our copybook.' They go a long way towards reaching out to the rather exuberant remark made by Lord Bowen that 'It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' This ideal state has yet to be achieved.

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In Malaysia, the Chief Justice Yang Amat Arif Tun Dato' Sri Ahmad Fairuz whilst sitting in Court of Appeal in the case of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561, has shown the lead and rightly said that procedural and technical objection must not be allowed to obstruct the process of giving justice.

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Justice Abdul Hamid Mohamad FCJ sitting in the Court of Appeal in the case of *Hock Seng Construction Sdn Bhd & Anor v Yeoh Poh Owi & Anor* [2001] 4 CLJ 1, had boldly asserted that the main function of the court is to do justice and not just to dispose cases. Further, His Lordship stated that it was unjust to dismiss a matter without hearing merits simply because of the mistake of the solicitor in not complying with the rules.

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Justice Gopal Sri Ram JCA had in *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329, placed the nail on the coffin in respect of procedural objections by stating that non-compliance of procedural requirements should not be treated as invalidating any action or proceeding or steps taken therein unless it occasions a substantial miscarriage of justice.

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- (c) From the cases above it is clear that the court has a wide discretion whether to condone or not to condone irregularities. In this context it is noteworthy to be guided by the observation of Suffian LP in the case of *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 where His Lordship observed (at p 189):

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The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.

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In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.

But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.

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This change of attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear*:

- A** Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.
- B** Today O 70 r 1 of our Rules explicitly states that non-compliance with our Rules —
Shall not render any proceedings void unless the court or a judge shall so direct ...
- C** (d) When non-compliance does not occasion any injury and cause no injustice to the opposite party or where they can be sufficiently compensated by costs or other terms imposed by the court, I take the view that the courts have a constitutional duty to hear the cases on merits. However, the power to condone non-compliance though discretionary must be exercised judicially on proper consideration within the spirit of the Federal Constitution and of the special circumstances of each case.
- D**
- E** [17] The respondents in this case take serious objections to non-compliance and on the facts of this case it cannot be said it is not without merits. However, the cases which they have relied on do not reflect the contemporary thinking and approach taken by our apex court in this area of procedural jurisprudence. The distinction in the instant case is that an ample opportunity was given to the applicant to set out the grounds for the application and the applicant has refused to do so and proceeded to file the summons in chambers in breach of O 32 r 1 of the RHC and of Form 62. To my mind, such conduct is an abuse of the process of court and ought to be dealt with punitive measures by ordering the solicitors to personally bear the costs of the application. I take the view that it is important and necessary for quick appreciation of the grounds the application, Form 62 must be complied with. Where there is non-compliance of Form 62, the court must insist on the same and give an opportunity to the applicant to comply with it, failing which the application must be dismissed with costs and the costs must be personally borne by the solicitors.
- G** For purpose of completeness, I must also add that any solicitor who takes unmeritorious procedural objections must be made liable to pay costs personally. Such an order will arrest procedural skirmishes in limine and pave way for cases to be heard on merits and this will also be a good step to reduce backlog of cases, as it will act as a deterrent to file unmeritorious application or raise objections.
- H** [18] With regard to the question of courts limitations in interfering with the internal management of a company, courts generally will not interfere by issuing interlocutory orders whilst hearing a s 181 petition. This does not necessarily mean that the court does not have jurisdiction and powers to make interlocutory orders to deal with any issues as the justice of the case may warrant. For example, the appointment of interim receiver in a pending suit may be granted at the discretion of the court as provided for in Part II, Chapter VII of the Specific Relief Act 1950.
- I** In this case, the applicant not seeking receiver to be appointed but is attempting to

seek an order which totally changes the character of the originating petition itself. This cannot be entertained as the relief set out under s 181 of CA 1965 is a restrictive remedy and cannot in principle be abused by way of interlocutory applications such as this to obtain investigative powers or like to fish evidence to support one's case. The rationale being, for the petitioner to succeed, the petitioner must make out a case on the facts transpiring on the date of the petition. Facts arising subsequent to the filing of the petition cannot be relied on. There are numerous authorities on this point and to mention a few are as follows: (i) *Kalinga Tubes Ltd v Shanthi Prasad Jain* AIR 1965 SC 1535 (ii) *Mohta Bros (P) Ltd v Calcutta Landing and Shipping Co Ltd* [1970] 40 Com Cases 119 (DB) (Cal).

[19] The applicant vehemently argues that the court can deal and grant the orders pursuant to the court's inherent jurisdiction, pursuant to O 94 r 4 of the RHC. I take the view that inherent jurisdiction is sacrosanct in nature and it must not be seen as a cure for all maladies which the law does not address, or able to provide the relief. The principles have been well articulated in many cases. The leading case in point is *Charles Forte Investment Ltd v Amanda* [1963] 1 Ch D 240. In this case the defendant, a shareholder, threatened the plaintiff that he will present a winding-up petition if certain of his shares were not registered. The company sought an injunction restraining the defendants from presenting the petition on the ground that his action was an abuse of the process of the court, and claimed that the petition was one which should be struck out under the courts inherent jurisdiction. Willmer LJ observed:

The plaintiffs here invoke the inherent jurisdiction of the court to stay proceedings which are vexatious or an abuse of the process of the court. They do not rely on any of the Rules of the Supreme Court, but solely upon the inherent jurisdiction. The judge held that this jurisdiction should not be exercised unless it were made perfectly clear that the plea could not succeed. He then proceeded to consider whether in his view it could be said that the plea could not possibly succeed. He considered, first, the contention that the petition would be bound to fail on its facts, and secondly, the contention that a winding-up petition was the wrong remedy. As to the latter, he came to the conclusion that in certain circumstances a winding-up petition could be a legitimate remedy in a case such as the present, and that it was at least arguable that it might be an appropriate remedy in this case. As to the other point, he in the end felt unable to say that on the facts this petition must necessarily be bound to fail. Consequently, he came to the conclusion that this was not a case in which he would be justified in invoking the drastic remedy of halting the proceedings in limine. From that decision the plaintiff company appeals to this court.

I need hardly say that I differ with reluctance from a decision of such an experienced judge as Pennycuik J., although I am encouraged by the fact that both my brothers in this court take the same view as I do. I am bound to say, however, that I have found the argument in support of this appeal wholly convincing, and I am satisfied that the judge came to a wrong conclusion.

As to the circumstances in which the inherent jurisdiction of the court may be invoked, I entirely accept the judge's caution, which he quoted from the *Annual Practice*, 1963, that this is a jurisdiction to be exercised with great circumspection.

A Danckwerts LJ observed:

I agree that the appeal must be allowed. In my view, the petition, if allowed to proceed, must fail and the presentation of the petition would be an abuse of the process of the court and should be prevented under the inherent jurisdiction which the court possesses.

B [20] There are many other cases which have dealt with inherent jurisdiction, to mention a few are as follows:

C (a) In *Loo Chay Meng v Ong Cheng Hoe* [1990] 1 MLJ 445, it was stated that if the rules do not provide for a certain situation, the court is at liberty to exercise its inherent jurisdiction to prevent injustice. However in *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178, the Supreme Court stated that it should not do so if the rules cover the circumstances adequately. In *Hamzah TR & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45, the Supreme Court stated that the court has unlimited jurisdiction to make any interlocutory order necessary for the proper administration and this may be apparent from the provision of O 92 of the RHC.

E [21] On the facts of the case, in my view when a person comes before the court seeking remedies in the nature of equitable relief, he must also be expected not to file applications which may be seen to be frivolous, vexatious and an abuse of process of court, as such conduct will reflect the unreasonable disposition of the petitioner. It is important to note that those who seek equity must do equity and who comes into equity must come with clean heads, which are some of the well known maxims of equities, and has practical significance for administration of justice. Further, equity in relation to legal remedies means justice administered according to fairness as opposed to strict rules of common law. The learned authors of *Black's Law Dictionary* (6th Ed) define equity as follows:

G Justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles, which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation. One sought relief under this system in courts of equity rather than in courts of law. The terms 'equity' denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men. Maitland defines equity as 'that body of rules administered by English Courts of Justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts known as courts of equity.'

H [22] For effective and meaningful administration of justice, the solemnness and sanctity of court proceedings must at all times be respected and acted upon by the conduct of all parties, inclusive of the litigants and advocates. Filing of applications without basis and merits or taking procedural objections without showing prejudice are indeed an attempt to waste court's time and the courts will not hesitate to make an order for costs in punitive terms. This is so because the issue of costs is at the discretion of the court and the courts can exercise it in any manner it wants within the judicious norms and the facts of the case.

I

[23] For the reasons stated above, it is my judgment that the petitioner's application, encl 33 must be dismissed with costs and costs to be taxed and paid to the respondents. I hereby order so.

Application dismissed with costs to be taxed

Reported by Peter Ling

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